Dissenting Views
H.R. 3261, Data Base and Collections
of Information Misappropriation Act

Under the U.S. Constitution, facts distributed to the public are deemed to have entered the public domain. Consumers, businesses, and others are free to use those facts and republish them. H.R. 3261, however, would essentially allow database producers to lock up facts, making them available to the American public only for a fee or not at all if such restrictions would give the database owners a competitive advantage. Competition in the information market would be restricted, leading to higher prices and less innovation. Moreover, enactment of the legislation could undermine the ability of American citizens to express their First Amendment and other constitutionally based rights.

We believe the bill suffers from fundamental legal defects, which under the Supreme Court's opinion in the *Feist* case rise to Constitutional dimension. Notwithstanding the Court's clear rejection of the "sweat of the brow" doctrine in *Feist* over a decade ago, the bill seeks to codify the doctrine. It relies on the Commerce Clause to achieve precisely what the Supreme Court found the Intellectual Property Clause prohibited: a copyright in facts. Moreover, notwithstanding the Second Circuit's articulation of a clear standard for the "hot news" doctrine in the *NBA v. Motorola* case, H.R. 3261 adopts a lesser standard as a basis for liability. Finally, notwithstanding the Supreme Court's recent articulation of concerns about perpetual copyright protection and the creation of "a species of mutant copyright law," this bill essentially gives database owners the ability to lock up facts forever.

Beyond these legal infirmities, the bill suffers from a weak economic rationale as well. The stated intent of H.R. 3261 is to provide database publishers with the incentive to invest in the collection of information. But the proponents of H.R. 3261 have failed to demonstrate that publishers need any additional incentive; the database industry in the United States is thriving, with publishers investing billions of dollars each year in the creation of new databases. Profit margins in the industry are higher than in most other industries, and the existing database companies continue to purchase other database companies, reflecting their confidence in the future of their industry.

Additionally, proponents of H.R. 3261 have failed to show a gap in the legal protection of databases that needs to be filled. While published facts enter the public domain, database publishers have a wide variety of legal mechanisms that protect a range of business models:

- The publisher can employ copyright law to protect the selection and arrangement of facts in a database. If a person copies most of a database, he probably has infringed the copyright in the database because he has copied the selection and arrangement of the facts.

- The publisher can distribute the database under a license that prohibits the copying and redistribution of information.

- The publisher can make the database available only on-line, where it can receive protection under the federal Computer Fraud and Abuse Act or state trespass to chattels, which have been successfully employed to protect databases.

- The publisher can use a technological protection measure to secure the database, and a person who circumvents the protection violates the Digital Millennium Copyright Act.

- The publisher of "hot news" can rely on state common law misappropriation.

Stripped to its essence, H.R. 3261 is not about preventing "piracy." It is about increasing publishers' revenue streams by allowing them to control information in an unprecedented way.

H.R. 3261 contains provisions that appear at first blush to mitigate its harm, but their benefits disappear on closer examination. The bill applies only to information that is redistributed in "a time sensitive manner," but this phrase is defined so indefinitely that it could include all information that has any commercial value. Reinforcing the breadth of the bill's scope is that it would apply to databases already in existence, including specifically encyclopedias and journal issues.

H.R. 3261 contains many uncertain terms that will lead to litigation. Unfortunately, the potential to receive treble damages will provide publishers with an economic incentive to adopt aggressive interpretations of the bill's ambiguities. For example, liability is triggered when a person redistributes a "quantitatively substantial part of a database." With the possibility of recovering treble damages, publishers will argue that as little as 5% of a database is a "quantitatively substantial part." The 1996 EU Database Directive, which inspired the proponents to seek database legislation in the U.S., has led to ruinous litigation across Europe, particularly with respect to specialized Internet search engines that provide consumers with access to news and product information. The litigation has centered on the Directive's ambiguous terms, some of which appear in H.R. 3621.

Examples of the bill's potential harm can be given from every sector of the economy. An Internet company might want to provide consumers with the ability to compare prices at different websites. A biochemist might want to publish a comparison of his results with that of a scientist at another biotech firm. A market analyst might want to publish a report listing the performance of a wide variety of financial instruments. All of these activities could be unlawful under H.R. 3261.

Information is the lifeblood of the Information Economy. Congress should not create a new regime that restricts access to information in the absence of any demonstrated market failure requiring government regulation. Moreover, of any committee in the House, this is the last committee that should be favorably reporting legislation with such potentially fatal constitutional flaws. We trust the bill will not ultimately become law and give monopolists the ability to lock up facts to the detriment of the American public.

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